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Supreme Court of the United States

October Term, 1980

DETROIT BOARD OF EDUCATION, et al., WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

and

LULAC COUNCIL, No. 11054, et al.,

Petitioners,

vs.

RONALD BRADLEY, et al.,

Respondents.

PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO CERTIORARI

THOMAS I. ATKINS
NAACP General Counsel
1790 Broadway
New York, New York 10019
(212) 245-2100

WILLIAM E. CALDWELL
Ratner, Sugarmon, Salky and Henderson
525 Commerce Title Building
Memphis, Tennessee 38103

NORMAN J. CHACHKIN
Lawyers' Committee for Civil Rights Under Law
Suite 520
Woodward Building
733 15th Street, N.W.
Washington, D.C. 20005

DAUNE ELSTON
1311 E. Jefferson Blvd.
Detroit, Michigan

Questions Presented

1. Did the Court of Appeals err in reversing as contrary to the law of the case a district court finding that shifting demographic changes had obliterated any obligation of the school officials to remedy the present effects of the adjudicated prior *de jure* violations?

2. Did the Court of Appeals err in vacating and remanding for further hearing a district court reassignment plan premised on the assumption that Hispanics could permissibly be treated as white for desegregation purposes?

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PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO CERTIORARI

Introduction

Plaintiffs, herein, submit this Consolidated Brief in response to the petitions for certiorari heretofore filed by the Detroit Board of Education, the State Defendants, and the Hispanic Intervenors.

The Detroit Board bases it petition on assumptions that the Court of Appeals: violated the teachings of this Court in *Pasadena*[1] by assertedly ignoring racial segregation caused by forces of demography over which the school offi-

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[1] *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

cials had no control; violated the teachings of *Swann*[2] and its progeny by requiring that some statistical racial balance be achieved; impermissibly took into account residential segregation in measuring the sufficiency of a student assignment plan; improperly ordered on remand a trial to determine whether Hispanics had been the victims of past *de jure* segregation as a predicate for determining whether or not Hispanics in Detroit could permissibly be treated as "white" for desegregation purposes; departed from precedents established in the Fourth and Fifth Circuit for determining requisite degrees of permissible desegregation in a predominantly black school district.

The State Defendants present in their petition the argument that the Court of Appeals transgressed *Milliken I* and its teachings on the predicates for inter-district liability findings.[3]

The LULAC Intervenors challenge a decision by the Court of Appeals affirming a district court denial of intervention to protect bilingual education programs.

Plaintiffs-Respondents argue herein that the Court of Appeals properly reversed district court findings which declared that shifting demographic patterns obliterated any present effects of past *de jure* conduct by school officials and thereby obviated the need for remediation within the bounds of feasibility. We also argue that the Court of Appeals properly applied this Court's earlier teachings in finding that the *de jure* actions of the state and local officials produced not only segregated schools but also contributed to residential segregation which itself had a reciprocal effect on the schools and the school district. We argue that

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[2] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[3] *Milliken* v. *Bradley (Milliken I)*, 418 U.S. 717 (1974).

the Court of Appeals properly affirmed the denial of intervention sought by the LULAC petitioners, that the amicus status accorded by the Court of Appeals will more than adequately protect any legitimate rights at this stage of the litigation and in light of the positions taken by the parties, and that the Court of Appeals did not err in remanding this matter for further proceedings on the issue of how Hispanic students should be classified for desegregation purposes in the remedial phase of this law suit.

Respondents are of the view that the matters sought to be reviewed are not in a posture which justifies review, and that in this regard the case is in a posture similar to that of the *Dallas* school case when it was similarly remanded by the Fifth Circuit.[4] The Court of Appeals decisions being challenged merely held the district court to the previous law of the case in measuring the adequacy of remedial

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[4] *Estes* v. *Metropolitan Branches of Dallas NAACP*, 48 U.S.L.W. 4118 (1980). In this case, the Fifth Circuit had remanded for further proceedings a district court desegregation plan which totally excluded an entire area of the Dallas school district, an area comprised almost wholly of one-race black schools. The Fifth Circuit concluded that it could not review such a desegregation plan in the absence of the type justification for these one-race schools this Court's *Swann* decision had indicated was necessary. It, therefore, remanded the case for the district court to either provide explanations for each one-race school to be left excluded or to develop a plan for student desegregation which included these schools. *Metropolitan Branches of Dallas NAACP* v. *Estes*, 572 F. 2d 1010 (1978). This Court accepted the petition for certiorari submitted by the Dallas school board, received briefs, heard oral arguments, then dismissed the Writ as improvidently granted. As the Court of Appeals concluded in the Fifth Circuit, the Sixth Circuit Court of Appeals also concluded that the district court plan had impermissibly or inexplicably excluded from desegregation the very schools which had borne the brunt of the prior *de jure* conduct, and remanded for further proceedings. As argued in the Dallas case, we will argue below that this Court should not accept for review a case in this posture, since the record is not fully developed and will not be until after the district court has obeyed the remand from the Court of Appeals.

orders, and rejected efforts by the district court to change the facts to fit remedial conclusions otherwise arrived at. The Court of Appeals, far from adhering to any rigid formula of racial balance, took due note of the "practicalities of the situation" [5] in remanding a plan for desegregation which, as an *a priori* matter, excluded the black central core regions in Detroit from participation in a desegregation plan. We urge this Court to deny each and every one of the petitions for certiorari, and to permit the experienced Court of Appeals below to complete the sensitive task of supervising the formulation of desegregation remedies which "promise realistically to work . . . now",[6] and which match the remedy to the past adjudicated violations in accordance with this Court's holdings in *Swann* and *Milliken I*.[7]

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[5] *Davis* v. *Bd. of School Commissioners of Mobile Co.*, 402 U.S. 33 (1971). In its previous remand decision, 540 F.2d at 238, the Sixth Circuit cited *Davis* in support of the impermissibility of treating as isolated such integral parts of the Detroit system as Regions 1, 5 and 8. The district court has been instructed to apply its August, 1977 remedial guidelines to the *entire* district, including Regions 1, 5 and 8.

It is thus clear that the Sixth Circuit's remand contemplated desegregation for regions 1, 5, and 8 no less meaningful than that originally approved for regions 2, 3, 4, 6 and 7. The Detroit defendants are plainly wrong when, at pages 23-24, they accuse the Court of Appeals of pursuing "token integration or specific racial ratios." It was the Detroit Board of Education's 1975 remedial proposal which first provided the inducement for the district court's impermissible exclusion of regions 1, 5 and 8 and resulting inadequate, or token, elimination of "the condition which offends the constitution."

[6] *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968).

[7] Both the Detroit and State defendants are quick to cite *Milliken I* for the proposition that the scope of the remedy cannot *exceed* the scope of the violation. (See, e.g., State brief at pp. 4-11; Detroit brief at pp. 19, 20, 21, 25, 26). These defendants ignore the corollary—the scope of the remedy must *equal* in its sweep the scope of the violation. Similar language on this point is to be

Statement

A. *Prior Proceedings Before This Court*

This case has already been before this Court on two previous occasions. On the first occasion, this Court held that the lower courts did not have adequate record basis for ordering the inclusion, for remedial purposes, of suburban school districts which had not been found liable for past *de jure* conduct, even though the liability of the Detroit and State officials for the *de jure* segregation within the Detroit Public School System had been established.[8]

On the second occasion, this Court affirmed the lower courts in holding that the state defendants, having been adjudicated as jointly liable with the local officials for the *de jure* segregation in the Detroit public schools, could permissibly be required to help pay for ancillary educational components necessary to remedy the continuing vestiges of the prior illegal conduct.[9]

B. *The* Milliken I *Remand: Phase One*

After the first remand, the district court undertook to develop a remedial plan limited to Detroit, in pursuit of which lengthy hearings were held from April-July 1975.[10]

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found in both *Swann*, 402 U.S. at 16 and *Milliken I*, 418 U.S. at 738 and simply underscore this Court's insistence that a federal court sitting in equity do complete relief, and restore the victims of the unconstitutional behavior to the position they would have occupied in the absence of the illegal conduct of the public officials. Also see, *Dayton Board* v. *Brinkman (Dayton I)*, 433 U.S. 406 (1977).

[8] See *Milliken I*, at pages 752-753.

[9] *Milliken* v. *Bradley (Milliken II)*, 433 U.S. 267 (1977).

[10] During the remand remedy hearings on the intra-district plan, proposed desegregation plans were submitted by the State and Detroit defendants, as well as by plaintiffs. The State Plan was,

On August 28, 1975, the district court entered its remedial opinion, ordering that five of the eight administrative regions in Detroit participate in desegregation, but finding that three of the regions were too black to be included in the remedy.[11] The district court also entered, in November, 1975, a faculty reassignment order, even though it had denied Plaintiffs an opportunity to present proofs on the magnitude of faculty segregation.[12] Plaintiffs appealed from the district court's remedial plan as to both students and faculty. The challenge to the student reassignment plan was based on Plaintiff's belief that the district court had excluded from the remedy those very parts of the public school system which had been most directly and visibly impacted by the prior *de jure* conduct of the defendants. The challenge to the faculty reassignment order was that it, being based on an evidentiary void caused by erroneous district court rulings during the remedy trial, failed adequately to address or redress the magnitude of faculty segregation existent in the school district and ignored the students' entitlement to non-segregated faculties without regard to prior findings on faculty liability.[13]

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essentially, silent on student reassignment, the Detroit Plan proposed to exclude the three blackest regions—regions 1, 5, and 8—from any student reassignment participation. The plan submitted by the Plaintiffs demonstrated how each of the eight internal administrative subdivisions of the Detroit public school system could be feasibly included within a desegregation plan.

[11] *Bradley* v. *Milliken*, 402 F. Supp. 1096 (Eastern District Michigan 1975).

[12] *Bradley* v. *Milliken*, 411 F. Supp. 943 (Eastern District Michigan 1975).

[13] This Court and other federal courts have repeatedly held that once *de jure* discrimination has been proven against public school officials, the students are entitled to a unitary system which includes not only unsegregated school buildings, but also non-segregated teaching faculties and other staffs.

The Court of Appeals agreed with the concern of the Plaintiffs, reversing the district court's establishing of *a priori* limitations on the amount of desegregation permissible and rejecting the district court's conclusion that the core Detroit regions could be excluded from the desegregation remedy without justifying findings on infeasibility.[14] The Court of Appeals also reversed the district court's conclusion that it was without authority to fully remediate known faculty segregation. The district court was directed to conduct a remand proceeding, and to permit Plaintiffs to present their proofs on faculty segregation and the need for remedial action, and to require the Detroit defendants to justify the exclusion of regions 1, 5 and 8 or effect their inclusion to the extent feasible.[15]

C. Milliken I *Remand: Phase Two*

On remand, the district court received additional proofs from the Detroit defendants, almost all of which was designed to argue that demographic shifts had resulted in a student enrollment which was predominantly black in the district, and almost totally black in the three regions previously excluded by the district court.[16] The defendants also argued that these demographic shifts had eliminated any present effects of the past *de jure* violations, and that it was not possible to say that the schools in regions 1, 5 and 8 were one-race because of past *de jure* conduct, since the demographic shifts would have made them black even

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[14] *Bradley* v. *Milliken*, 540 F.2d 229, 237-240 (6th Cir., 1976).

[15] On remand the district court entered, after hearings, a faculty desegregation order which is in place and was not before the 6th Circuit.

[16] At the time of the remand from the 1976 Order of the Court of Appeals, the Detroit public schools had a student enrollment which was 85% black. See, Detroit Petition Appendix (Pet. App.) at page 46a.

in the absence of the *de jure* conduct. The defendants asked to be relieved of the necessity of any further student desegregation.

The district court entered its opinion after the remand proceedings, finding as a matter of law that the defendants had carried their burden of proving that the one-race schools in 1, 5 and 8 were not the product of past *de jure* conduct. The district court concluded, however, that the District had failed adequately to include schools in region 2 as a part of the desegregation plan, a failure the district court attributed to the defendants' desire to avoid involving Hispanic students whose bilingual programs it was asserted might otherwise be disrupted.[17] The district court firmly rejected this basis for excluding the region 2 schools, declared that for purposes of Detroit desegregation Hispanics should be treated as white, and ordered the development of a plan which would pair schools from region 2 with the one-race black schools in region 1.[18] From this district court order appeals were taken by both defendants and plaintiffs: the defendants arguing that the district court had erred in requiring any further desegregation and by labeling Hispanics as white; plaintiffs arguing that the district court's conclusion about the absence of present effects from the prior violations was in error and contrary to the law of the case.[19] Also appealing the district court

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[17] Ibid, at page 59a.

[18] Ibid, at pages 76a-77a.

[19] In our brief to the Court of Appeals, at page 29, we pointed out that this Court had directed "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." *Milliken I*, 418 U.S. at 753. We also pointed out, at page 30, that the Court of Appeals in its earlier reversal and remand had held that the three excluded regions, 1, 5, and 8, were "in the area most affected by the acts of *de jure* segregation of which both the Detroit and State Defendants have been found guilty." *Bradley* v. *Milliken*, 540 F.2d at 238. The remand by the Court of Appeals was

decision were parties representing Hispanic students, whose earlier attempt to intervene had been rejected by the district court, an intervention prompted by district court remarks during the remand proceedings about the nature and status of the bilingual programs in region 2.[20]

The matters appealed, including plaintiffs' appeal from an earlier district court denial of a motion to recuse,[21] were

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explicit in rejecting the "erroneous theory . . . that the mere elimination of identifiably white schools satisfies the criteria of *Brown*." 540 F.2d at 239. The Court of Appeals remanded in language too clear to be mistaken, saying that its action was taken to "remand the case for further consideration in regard to the three central regions of the City of Detroit which both the school board and the District Judge excluded from their proposed remedial plans. We cannot hold that where unconstitutional segregation has been found, a plan can be permitted to stand which fails to deal with the three regions where the majority of most identifiably black schools are located." 540 F2.d at 240.

[20] For discussion of the circumstances prompting the attempt at intervention by parties representing Hispanic students, see LULAC brief at pages 2-4. Unless otherwise indicated, all references to the Petition Appendix (Pet. App.) will refer to the Appendix annexed to the Detroit brief. References to the briefs of the petitioners will so indicate.

[21] By an order of April 15, 1975, explained at 402 F. Supp. at 1104, the district court appointed three experts to assist it in reviewing and evaluating the remedial plans presented as a result of the *Milliken I* remand for intra-district relief. The circumstances surrounding the court's use of these experts and other conduct on the part of the district court, prompted Plaintiffs to file a motion seeking the disqualification of the district court Judge. Plaintiffs' motion for recusal was denied by the District Judge, 426 F. Supp. 929 (1977). Since an order denying a motion for disqualification is neither final nor appealable, see e.g., *Kelly* v. *Metropolitan County Board of Education*, 479 F. 2d 810, 811, note 1 (6th Cir. 1973), and cases there cited, the orders denying recusal did not become appealable until the district court entered its amended Judgment of November 17, 1978. Federal Rules Civil Procedure 54 (b); also see *Oliver* v. *Michigan State Board of Education*, 508 F. 2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). In its April 14, 1980 Opinion, the Court of Appeals affirmed the district court's denial of our motion to recuse. That matter is not before this Court in these petitions.

all consolidated for briefing and argument before the Sixth Circuit.

D. Milliken I *Remand: Phase Three*

The Court of Appeals, based on its independent review of the record evidence and long experience with the facts of this case,[22] reversed the district court conclusion that there were no present effects from the prior *de jure* violations;[23] reversed the conclusion that shifting demographic patterns could constitute a defense against such further desegregation as was feasible on the record without undermining a viable desegregation plan;[24] rejected the district court attempt to treat Detroit's administrative regions as inviolable for purposes of desegregation;[25] affirmed the district court denial of intervention to the Hispanic representatives;[26] vacated the district court conclusion that Hispanics could be treated as white in Detroit's desegregation plan;[27] affirmed the district court's denial of plaintiffs' motion to recuse;[28] and remanded, with instructions that the Hispanic parties were to be granted intervention rights to litigate the issue of whether the school officials had committed *de jure* violations against Hispanics such as to justify treating Hispanics as minorities for desegregation pur-

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[22] This long-running school desegregation case has been before the Sixth Circuit on several occasions: in 1970, as reported at 433 F. 2d 897; in 1971, as reported at 438 F. 2d 945; in 1973, as reported at 484 F. 2d 215; in 1976, as reported at 540 F. 2d 229; and in 1980, as reported in the Slip Opinion of April 14, 1980, the Opinion which gives rise to the present petitions before this Court.

[23] Pet. App., at page 13a.

[24] Ibid at page 13a.

[25] Ibid at pages 15a-19a.

[26] LULAC Appendix, at pages 6-9.

[27] Pet. App. at pages 19a-24a.

[28] Ibid at pages 26a-29a.

poses;[29] and, further directed that the district court was to disregard the internal administrative subdistrict lines in its further effort to involve, to the extent feasible, additional students from regions 1, 5 and 8 in the desegregation remedy.[30] It is this series of actions by the Court of Appeals which form the basis for the three petitions for certiorari which are now before this Court.

REASONS FOR DENYING THE WRITS SOUGHT

I.

The Court of Appeals Properly Rejected and Reversed, as Contrary to the Law of the Case and Other Applicable and Controlling Legal Principles, District Court Conclusions That Subsequent Demographic Shifts Rendered Present Segregation Irremediable and Obliterated All Vestiges of the Prior *De Jure* Conduct.

A. *The Present Segregation Flowed From the Prior* De Jure *Conduct Rather Than Solely From Demographic Shifts*

Contrary to the distorted and inaccurate assertion by the Detroit defendants that "The predicate for this reversal was a *sua sponte* 'finding' by the Sixth Circuit *de hors* the record that all population shifts and all private housing decisions are 'vestiges' of prior school segregation by the defendants",[31] the Court of Appeals grounded its action on the settled law of the case as it has unfolded over more than 10 years of extensive litigation. The Court of Appeals held that "the record demonstrates that *these* population

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[29] Ibid at pages 24a-26a.

[30] Ibid at pages 16a-17a.

[31] Detroit Brief at page 11.

changes themselves are *in part* vestiges of discrimination." [32] (emphasis added) The Court of Appeals does not attempt to attribute *all* population shifts or *any* private housing decisions to the prior *de jure* discrimination by the defendants. Rather, it cited the earlier findings by Judge Roth for the proposition that the school officials had deliberately exploited and incorporated known residential segregation as a part of their intentional efforts to separate students on the basis of race,[33] and agreed with this Court's teachings in *Swann* and *Keyes* that deliberate segregative actions by school officials have clear and frequently profound reciprocal effects on the racial composition of surrounding residential areas.[34]

B. *The Sixth Circuit Rulings Are In Harmony With Other Circuits*

Whatever might have been the meaning or reason for the findings and conclusions in the Fourth and Fifth Circuits in dealing with, respectively, Richmond[35] and Atlanta[36] desegregation, the law of this case conclusively establishes that the racial segregation in the Detroit public schools was the product of the actions of the public officials, and not demographic factors such as population shifts. Thus, the effort of the Detroit defendants to rely upon the language or reasoning in those two cases sheds no light on the instant matters which faced the Court of Appeals initially, and this

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[32] Pet. App. at 13a.

[33] *Bradley* v. *Milliken*, 338 F. Supp. at 587, 593. Also see 484 F. 2d at 242.

[34] See, particularly, Pet. App. at pages 8a-13a.

[35] *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058 (4th Cir. 1972) *aff'd by equally divided Court*, 412 U.S. 92 (1972).

[36] *Calhoun* v. *Cook*, 522 F. 2d 717 (5th Cir. 1975), *reh. den.* 525 F. 2d 1203 (5th Cir. 1975).

Court now.[37] In any event, the Court of Appeals specifically considered and rejected as inapplicable the Fifth Circuit decision in the Atlanta case.[38] The Court of Appeals rejected as inapplicable the Atlanta decision, in part, because of substantially different factual background.[39]

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[37] It is important to note that the Court of Appeals for the Sixth Circuit has been required to review on two separate occasions the efforts of both the Detroit defendants and the district court to relitigate the liability findings of this case as justification for excluding regions 1, 5 and 8. When this matter was on appeal before the Sixth Circuit in 1976, the inapplicability of the Fourth Circuit holdings in the Richmond case were explicitly discussed, 540 F. 2d at 235, n. 3, at least in part because the Fourth Circuit found and held that Richmond had achieved unitary status under the prior desegregation orders and no further jurisdiction existed to consider and order the metropolitan remedy then at issue. See, 462 F. 2d at 1069. Neither in 1976 nor in the present matters when they were before the Sixth Circuit were inter-district remedies at issue.

[38] Pet. App. at page 17a, n. 3. The Sixth Circuit makes clear that the Atlanta case is distinguished from the Detroit case because of the "decision of the district court (in Detroit) to treat the inner-city regions as units and to exclude them entirely from the reassignment plan . . ." It noted that there was "no indication those 62 identifiably black schools (in Atlanta) were concentrated in one or several administrative regions left wholly untouched by the pupil reassignment plan. Moreover, if we were convinced that the Fifth Circuit permitted Atlanta's desegregation plan to be limited by intra-district administrative lines, we would be forced to disagree with its decision."

[39] The Fifth Circuit affirmance of the district court was, in part, based on its refusal to hold as clearly erroneous the district court findings that Atlanta had achieved unitary status and had eliminated the vestiges of its racially discriminatory past actions. See, 522 F. 2d at 719, 720. It is thus clear that both Richmond and Atlanta were viewed by their respective Courts of Appeals as having achieved that status this Court's *Pasadena* decision held deprived federal courts of further jurisdiction to require remedial action. In the instant matter, the Sixth Circuit, in language too clear to be mistaken, has held that the vestiges of prior *de jure* discrimination have yet to be extirpated in Detroit. This Court's *Milliken II* decision is further proof that the effort to exorcise unconstitutional vestiges in Detroit continued beyond the initial 1975 desegregation order of the district court: yet it is precisely that reassignment plan the Detroit defendants would have this Court cast in constitutional concrete as dispositive of all adjudicated liabilities.

C. *The Sixth Circuit Rulings Comport With This Court's* Milliken I *and* Pasadena *Decisions*

The arguments of the Detroit and State defendants that either *Pasadena* or *Milliken I*[40] have controlling impact on the issues before the Court of Appeals are without merit. This Court's decision in *Pasadena* made clear the factual circumstances in which that case was decided: "All that is now before us are the questions of whether the district court was correct in denying relief when petitioners sought to modify the 'no-majority' requirement as then interpreted by the District Court."[41] The key factual question in *Pasadena* was whether, in a school district which had admittedly achieved the desegregation standards set by the courts, subsequent population shifts with no proven relationship to conduct by the school officials would provide the predicate for annual corrections in the racial composition of the public schools. In short, in *Pasadena* unitary status had been achieved but was later threatened by other intervening factors. In Detroit, unitary status has never even been approximated, much less achieved, and the Court of Appeals action must be seen as part of the as yet incomplete effort to eliminate the fact and vestiges of the adjudicated dual system.[42]

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[40] The Detroit Brief, at pages 11, 19 (n. 17), 25-26, argue the applicability of *Pasadena* to the totally different factual circumstances of this case. At pages 17ff this Court's *Milliken I* interdistrict holdings are urged as having some inexplicable applicability to these intra-district proceedings.

[41] *Pasadena,* op. cit., at p. 432.

[42] See, *Pasadena,* at p. 436, where this Court noted that the population shifts sought to be corrected for by the district court were not "attributed to any segregative actions on the part of the (Pasadena school board) petitioners . . ."; *compare* with the language of the Sixth Circuit which held that "the record demonstrates that *these* population changes themselves are in part *vestiges of past discrimination*" (emphasis added), at Pet. App. 13a.

In *Milliken I* this Court did not even address the question of unitary status, and affirmed the lower courts in finding explicit *de jure* conduct which had created the dual system of black and white schools.[43] Thus, to the extent this Court addressed intra-district issues, it was to support the determinations of the lower court that systemwide relief was necessary to remedy the systemwide impact of the explicit public discrimination and segregation.[44] Nor can the defendants take solace from this Court's treatment of the inter-district issues raised in *Milliken I*, since no inter-district issues were before the Court of Appeals on direct appeal, and none were decided by it in the April 14, 1980 opinion and orders which form the bases for the petitions before this Court. While correctly noting this Court's affirmance of lower court findings of *de jure* conduct, the Detroit defendants omit reference to and disregard the impact of the systemwide effects these violations were found to have had.[45] The Court of Appeals made clear that its reversal

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[43] "Although the list of issues presented for review . . . do not include argument on the findings of segregative violations on the part of the Detroit defendants two of the petitioners argue in brief that these findings constitute error . . . [U]nder our decision last Term in *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973) the findings appear to be correct." 418 U.S. at 738, n. 18. This Court also held that "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." 418 U.S. at 746.

[44] As Justice Stewart's concurring opinion in *Milliken I* stated, "Within a single school district whose officials have been shown to have engaged in unconstitutional racial segregation, a remedial decree that affects every individual school may be dictated by 'common sense' . . . and indeed may provide the only effective means to eliminate segregation 'root and branch' . . . and to 'effectuate a transition to a racially nondiscriminatory school system . . .'" 418 U.S. at 754-755; and "The record here does support the claim made by the respondents that white and Negro students within Detroit who otherwise would have attended school together were separated by acts of the State or its subdivision." 418 U.S. at 756, n. 2.

[45] See, for instance, Detroit brief at note 13, and 418 U.S. at 725-27. As the district court, Sixth Circuit and this Court have

and remand was for the explicit purpose of seeing to it that the scope of the remedy fit the scope of the systemwide violation which had been found and never corrected.[46]

The State defendants argue that the Court of Appeals erroneously attributed the school segregation within the Detroit public schools to the reciprocal impact of school and housing segregation and discrimination both within Detroit and between Detroit and the surrounding communities.[47] Specifically, the State Defendants argue that the Court of Appeals disregarded and did violence to this Court's *Milliken I* findings.[48] Yet, the Court of Appeals merely applied the previous findings by the district court, the Court of Appeals and this Court in this case, in finding that the district court erred when it said that[49]

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each noted, where the impact of the *de jure* segregative acts of the public officials has been systemwide in scope, it is only "common sense" to require a remedy equally as pervasive. *Keyes*, 413 U.S. at 203.

[46] In its April 14, 1980 decision remanding this case to the district court for further proceedings, the Court of Appeals emphasized that "This Court has recognized from the first that some one-race schools are unavoidable under a Detroit-only plan. See 540 F. 2d at 237; 484 F. 2d at 249." Pet. App. at pages 16a-17a. Again the Court noted "In some situations, it may be that the small number of white students available for reassignment from a particular school, coupled with the distance they would have to be transported to reach an inner-city school that can be paired with other white schools, will justify maintaining present assignment patterns. We emphasize that this remand is not intended to disrupt previously-approved assignment patterns." Pet. App. at page 18a. And, "although genuine constitutional desegregation may be impossible within the Detroit district, this Court has the obligation to see that all practical steps are taken to remedy the unconstitutional segregation that has been found to exist." Pet. App. at 19a.

[47] See State brief, pages 4ff.

[48] State brief at pages 4-8.

[49] Pet. App. at 50a.

> "The demographic data presented . . . compels us to further conclude that it is the demographic residential patterns, operating independently of school assignments, together with the predominance of blacks in the school system, and not the segregative acts of the Detroit Board and the state that have resulted in the one race schools that remain in regions 1, 5 and 8."

and that:[50]

> "These pronounced demographic shifts . . . and the predominance of the black student population have obliterated the optional and gerrymandered attendance zones which permitted white students to avoid attending integrated schools, the practice of busing black students from overcrowded schools beyond a closer white school and the practice of altering feeder patterns in racially changing neighborhoods."

The Court of Appeals noted Judge Roth's original finding that the school officials had knowingly and deliberately exploited the residential segregation created by the actions of public and private agencies and persons to carry out their own policies of school segregation:[51]

> "When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition that exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of schools."

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[50] Ibid at 49a.

[51] Ibid at 88a.

The Court of Appeals then noted its language in affirming Judge Roth's findings of *de jure* violations within Detroit:[52]

> "In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State Defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation."

The Court of Appeals pointed out in its April, 1980 opinion that Judge Roth's findings "that present Detroit housing patterns reflect the Board's past discrimination" accords with the analysis of the Supreme Court in *Swann* and *Keyes*.[53]

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[52] Ibid at 10a.

[53] In *Swann, op. cit.*, this Court held:

> "The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system . . . Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns, which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy." 402 U.S. at 20-21.

Two years later, in *Keyes, op. cit.*, this Court held:

> "So, also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of marking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." 413 U.S. at 201.

The Court of Appeals rejected both the District Court's demographic conclusions and the Detroit Board's arguments in support of those conclusions with this language:[54]

> "Viewed in this light, Judge DeMascio's holding, urged by the (Detroit) Board before this Court, is that the segregative effects of the defendants' discriminatory policies have been obliterated by the very demographic changes those policies helped to produce. We conclude that this argument refutes itself. It is the law of this case that the unconstitutional actions of defendants, both local and state, contributed to the segregated residential patterns and the one-race schools that now exist in Detroit. Judge Roth found that *de jure* school segregation encouraged whites to flee from racially changing neighborhoods and ultimately from the Detroit school district. That finding is supported by substantial record evidence. . . ."

Fearful of yet being found liable for inter-district *de jure* acts which might form the predicate for inter-district relief, the State defendants argue that

> ". . . the Court of Appeals has completely disregarded this Court's holding and concluded that past *de jure* school districts which, in turn, produced a current conresidential concentration of blacks within Detroit and a present residential concentration of whites in other school districts whcih, in turn, produced a current condition of school segregation . . . [T]he Circuit Court completely ignored this Court's prior ruling in the case and applied a theory which can only lead to multidistrict racial balancing."[55]

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[54] Pet. App. at 13a.

[55] State brief at page 8.

But the Court of Appeals has simply held to this Court's *Swann* and *Milliken I* teachings that the scope of the remedy must fit the scope of the violation, teachings reaffirmed in *Dayton I, Columbus* and *Dayton II,* as well as in *Milliken II.*[56] The State defendants cannot now be heard to complain that the present effects of the prior adjudicated violations should be disregarded by a federal court sitting in equity, even though fashioning the remedy may require difficult and sensitive choices. Far from rushing out in search of a metropolitan remedy with which to torment the State defendants, the Court of Appeals has insisted that this Court's *Milliken I* remand for complete intra-district relief be complied with by the school officials and the district court.[57]

The Court of Appeals has not required nor expected the school officials to "chang[e] the racial residential patterns either within Detroit or between Detroit and other school districts", as feared by the State defendants.[58] Nor are the defendants expected to "purge their past sins" by controling residential patterns.[59] The Court of Appeals has made clear that what the school officials, local and state, are expected to do is to undo the present effects of their own illegal conduct, to the extent feasible.[60]

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[56] See particularly the Court's *Milliken II* decision, 433 U.S. at 282-83, where this Court noted: "But where, as here a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.' . . . The 'condition' offending the Constitution is Detroit's de jure segregated school system. . . ."

[57] Pet. App. pages 16a-19a.

[58] State brief at page 9.

[59] Ibid.

[60] As is clearly set forth in the April 14, 1980 Decision, Pet. App. pages 16a-19a, the Court of Appeals, while holding the district court to the task of correcting the "condition that offends the Constitution," *Swann,* 402 U.S. at 16, nonetheless goes to great pains to make clear its sensitivity to the difficult task before the district

Against the backdrop of our argument above, it is clear that the contention of the Detroit petitioners,[61] must be rejected because Detroit, unlike *Pasadena, Calhoun* and *Bradley,* has never achieved unitary status. Thus, the April 14, 1980 decision of the Sixth Circuit is not at war with either the Fourth or Fifth Circuit holdings, nor this Court's decisions.

The contention of the Detroit petitioners that the Court of Appeals ignored "The mandates of this Court regarding judicial review of desegregation plans which have yielded present neutral assignment patterns and policies".[62] has already been anticipated by the Court of Appeals in its April 14 decision:

> "The short answer to this argument is that a racially neutral assignment plan does not necessarily achieve a racially neutral attendance pattern. The Board's plan is limited by residential patterns which reflect past discrimination, as well as by district lines and transportation problems." [63]

As the Court of Appeals noted, quoting from this Court's decision in *Swann*:

> "The objective is to dismantle the dual school system. 'Racially neutral' assignment plans . . . may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from dis-

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court. In this connection, the Court of Appeals recognizes that some one-race schools may be unavoidable, that present assignment patterns should not be needlessly disrupted, and that practicalities such as transportation, time or distance might further limit additional desegregation.

[61] See Detroit brief at pages 11-16.

[62] Ibid, at pp. 17-20.

[63] Pet. App. at page 21a.

> criminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. . . . In short, an assignment is not acceptable simply because it appears to be neutral." [64]

The argument of the Detroit petitioners that the Sixth Circuit decision impermissibly ignored naturally integrated neighborhoods,[65] is simply a thinly-disguised invitation for this Court to ignore its own recognition that the courts below have the difficult task of balancing the various interests and equities in fashioning an appropriate remedial plan. There is nothing in the April 14 decision to even remotely suggest that the Sixth Circuit is either unmindful of or unconcerned about existing levels of desegregation or integration. In fact, just the opposite reality emerges from a reading of the Sixth Circuit's repeated acknowledgment of the flexibility which must be accorded the district court in shaping its remedy within constitutional frameworks.[66]

To the extent the Detroit Petition states a coherent argument in its complaints about "Token Integration by Trial and Error",[67] we assume it refers to the possibility that some additional schools may result with less than majority white status.[68] As Chief Justice Burger's opinion in *Milliken I* pointed out:

> "The suggestion in the dissent of Mr. Justice Marshall that schools which have a majority of Negro students are not 'desegregated' . . . finds no support in our prior cases. In *Green* . . . this Court approved a desegrega-

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[64] *Swann*, 402 U.S. at 28.

[65] Detroit brief, at pp. 21-23.

[66] Ibid, p. 23, n. 27.

[67] Detroit brief, pp. 23-25.

[68] Ibid., p. 23, n. 27.

> tion plan which would have resulted in each of the schools within the district having a racial composition of 57% Negro and 43% white. In *Wright* . . . the optimal desegregation plan would have resulted in schools being 66% Negro and 34% white . . . And in *U.S.* v. *Scotland Neck* . . . a desegregation plan was implicitly approved for a school district which had a racial composition of 77% Negro and 22% white. In none of these cases was it even intimated that 'actual desegregation' could not be accomplished as long as the number of Negro students was greater than the number of white students." [69]

While we do not agree with this reading that Justice Marshall was unconcerned about "the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered", we do agree with the contention that desegregation is not made impossible in districts a majority of whose students are nonwhite. While there are practical limitations on the amount of desegregation which might be achieved, the requirement to eliminate the dual system does not vanish simply because the school officials may have been so successful in their prior illegal behavior as to have driven the more mobile white families from the city and their students from the school district.

In light of the sound evidentiary and record basis for the decisions of the Court of Appeals, coupled with the full opportunity which will be afforded the Detroit and State petitioners on remand to offer such proofs as they may have to help guarantee that the remedy will be tailored to the adjudicated systemwide violations, this Court should reject the arguments of these petitioners and permit the

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[69] *Milliken I*, 418 U.S. at 747, n. 21.

Court of Appeals to continue supervising the, admittedly slow, progress towards a complete intra-district remedy within the bounds of feasibility. Specifically, this Court should reject the State petition in its entirety, and the issues raised by the Detroit petition at pages 11-25.

II.

The Court of Appeals Did Not Err in Its Treatment of the Issues Concerning Detroit's Hispanic Students.

The Detroit Board argued in the district court that Hispanic students should not be further involved in the reassignment portion of the desegregation plan, because such participation might disrupt on-going bilingual programs. The district court believed, and asserted, that the Detroit Board was actually permitting region 2 students, white and Hispanic, to be shielded from involvement on desegregative reassignments:

> ". . . your own statistical data shows that (the bilingual program as run by the Detroit Board) is resegregating the entire system and that is the seed for resegregating every region in the District." [70]

The district court comments prompted a motion to intervene, filed by the LULAC petitioners on behalf of Hispanic students and their parents fearful of losing bilingual programs.[71] The district court, under directions from the Court of Appeals to end its exclusion of schools from regions 1, 5 and 8, ordered the Detroit Board to develope a

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[70] April 28, 1978 district court Transcript, quoted in the LULAC brief at pages 3-4.

[71] LULAC brief, pp. 4-5.

plan which would pair region 1 and region 2 schools.[72] The district court also denied the LULAC intervention.[73]

The Court of Appeals was urged by LULAC to reverse the denial of intervention, under both F.R.C.P. 24(a) and 24(b). The Detroit Board urged the Court of Appeals to reverse the district court's conclusion that Hispanics in Detroit should be treated as white for desegregation purposes, and specifically urged the Court of Appeals to vacate the order requiring desegregative pairings between region 1 and 2 schools. The Court of Appeals declined to order the LULAC intervention,[74] though it urged the district court to consider granting *amicus* status,[75] and concluded that the record did not permit a decision on whether Hispanics could be treated as white for desegregation in Detroit.[67] In order to provide a record basis for appellate review, the Court of Appeals instructed the district court to hold an evidentiary hearing to determine whether prior school district conduct towards Hispanics was *de jure* discrimination, and accorded LULAC full party status to litigate that issue in the district court.[77] These Court of Appeals decisions prompted the Detroit Board to challenge the propriety of the remand for evidentiary hearings, and led to the LULAC challenge of the Court of Appeals refusal to reverse the denial of intervention.

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[72] Pet. App. at pp. 76a-80a, the district court orders of August 7, 1978 and November 17, 1978.

[73] LULAC Appendix, at pages 1-4.

[74] Pet. App. at pp. 32a-34a.

[75] Ibid., p. 34a.

[76] Ibid., p. 24a.

[77] Ibid., pp. 24a-25a.

A. *The Court of Appeals Did Not Err in Ordering a Limited Remand on the Issue of Prior School District Treatment of Hispanic Students*

The Detroit Board, in urging this Court to grant review of the remand on Hispanic treatment, relies on *Keyes* for the propositions that "the presence or absence of segregation in a school does not determine whether Hispanics are black or white",[78] and "no hearing or factual findings are necessary to conclude, as a matter of law, that Hispanics should not be treated as white in this case",[79] and "they are, like blacks, an ethnic minority which suffers from the same discrimination and disadvantages as blacks when compared to whites".[80]

This Court's determination in *Keyes* was that the district court erred in not counting as segregated those schools which had a combined predominance of blacks and Hispanics, and based that determination on the:

> "agreement that, though of different origins, Negroes and Hispanics in Denver suffer identical discrimination in treatment when compared with treatment afforded Anglo students." [81]

Thus, the *Keyes* Court found disadvantage to have flowed from the historical Southwestern discrimination against Hispanics. Here, the Detroit petitioners contend that the discrimination flows from being disadvantaged.

Nor are the Detroit petitioners aided by the other cases cited for their position on this matter. For instance, *Booker* v. *Special District No. 1,* 585 F.2d 347, 354 (8th Cir. 1978),

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[78] Detroit brief, at pp. 29-30.

[79] Ibid., at p. 28.

[80] Ibid., at p. 29.

[81] *Keyes,* 413 U.S. at 197-198.

concerns the "separate classification and treatment of Indians," as does *U.S.* v. *Antelope,* 430 U.S. 641 (1977), *Moe* v. *Salish and Kootenan Tribes,* 425 U.S. 463 (1976), *Fisher* v. *District Court,* 424 U.S. 382 (1976), and *Morton* v. *Mancari,* 417 U.S. 535 (1974).

Evans v. *Buchanan,* 416 F. Supp. 328 (1976) and *Morgan* v. *Kerrigan,* 401 F.Supp. 216 (1975) each represent instances in which district courts exercised their discretion to permit intervention during remedial phases. Neither case stands for the constitutional position being asserted by the Detroit petitioners; namely, federal courts are required to disregard the factual circumstances which surround the treatment of Hispanics. The Detroit petitioners would erect an irrebutable presumption of similar historic experiences or treatment as between blacks and Hispanics, without regard to locale or other historical or factual circumstances. We find no warrant for such a position in the decisions of this Court.[82]

Accordingly, we urge this Court to reject the Detroit position that no careful and sensitive inquiry need be made by federal courts to determine the extent to which, if at all, desegregation decrees may need to be expanded to include all those victimized by the illegal conduct of public school officials. We believe the Hispanic students are entitled to demonstrate the full range, if any, of harmful impacts caused by the *de jure* acts of school officials, as is permitted by the Sixth Circuit remand. Notwithstanding the Detroit Board's distortions, more is at stake here than simply determining "the racial classification of Hispanics."[83] The remand hearing ordered by the Sixth Circuit opinion and

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[82] See discussion by the Court of Appeals, Pet. App. at pp. 22a-24a.

[83] Detroit brief, at pp. 28-30.

challenged by the Detroit petitioners will determine, among other things, whether Hispanic students have been deprived of constitutional rights under the precedents of this Court. We are not surprised that the Detroit Board would rather not have such an inquiry undertaken. This Detroit Board discomfort at what might be revealed in the prospective remand hearing does not, however, rise to a constitutionally cognizable level.

B. *The Court of Appeals Did Not Err in Affirming the District Court's Denial of LULAC Intervention*

In our view, the application of the LULAC intervenors was timely filed, and their participation in the litigation would not unduly delay the proceedings. We take no view on the likelihood that the Detroit Board will be able to represent the Hispanic interests in these proceedings. We only note, in this regard, the passion with which the Detroit Board has sought to shield white students from full involvement in desegregation, and do not expect similar passion on behalf of the District's Hispanic students. We do not question the ability or desire of LULAC to represent Hispanic interests in desegregation matters, generally, or this case in particular.

Notwithstanding our views about the feasibility of LULAC participation, we do not believe the Court of Appeals committed reversible error in affirming the district court denial of intervention. While the district court would have been, and still is, within the sound exercise of its discretion in granting the intervention sought, it was equally entitled to exercise its discretion to deny intervention at this time.[84] Under these circumstances we do not

[84] We do not read the cases cited by LULAC to *require* intervention under the factual circumstances which here prevail, to the extent the cases are relevant at all. For instance, 7 of the cases

believe the Court of Appeals action provides a basis for granting the LULAC petition for certiorari. Our view is grounded on two observations. First, as noted by the Sixth Circuit, the district court has already instructed the Detroit school officials to "make provisions for bilingual/bicultural programs" and to create new programs (where necessary) to maintain the current level of bilingual/bicultural offerings.[55] Secondly, the Sixth Circuit remand on the issue of whether *de jure* segregation of Hispanics has occurred will provide, in light of the intervention status accorded LULAC for the remand, an even broader opportunity for the assertion and protection of Hispanic interests.

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have facts rooted in commercial or labor disputes of various types: *Atlantis Devel. Corp.* v. *U.S.*, 379 F.2d 818 (5th Cir. 1975); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 368 U.S. 129 (1967); [*Innis, Speiden & Co.* v. *Food Mach. Corp.*, 2 F.R.D. 261 (D. Dela., 1942);] *Kozak* v. *Wells*, 378 F. 2d 104 (8th Cir. 1969); *McDonald* v. *E.J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1972); *Trbovich* v. *U.M.W.*, 404 U.S. 528 (1972). We have already expressed the view that LULAC's participation would occasion no undue delay. We, therefore, need not comment on the other cases cited in support of these propositions: *Atkins* v. *Bd. of Educ.*, 418 F.2d 784 (4th Cir. 1969); *Dowell* v. *Bd. of Educ., Oklahoma City*, 420 F.2d 865 (10th Cir. 1970); *Evans* v. *Buchanan*, 416 F.Supp. 328 (D. Del. 1976); *Hatton* v. *Cty. Bd. of Educ.* 422 F.2d 457 (6th Cir. 1970) *Keyes* v. *School Dist. No. 1*, 380 F.Supp. 673 (D. Colo. 1974); *NAACP* v. *New York*, 413 U.S. 345 (1973); *Pate* v. *Dade County School Board*, 303 F.Supp. 1068 (S.D. Fla. 1969); *Robinson* v. *Shelby County Bd.*, 330 F.Supp. 837 (W.D. Tenn. 1971); *U.S.* v. *Georgia*, 428 F.2d 277 (5th Cir. 1970); *U.S.* v. *Jefferson Cty. Bd.*, 372 F.2d 836 (5th Cir. 1966). We agree with LULAC that *permission* to intervene would not have been error. The facts of the Boston case, *Morgan* v. *Kerrigan*, 410 F.Supp. 216 (D. Mass. 1975), are clearly distinguishable from those at bar. There, the black plaintiffs proposed to Hispanic representatives the desirability of intervention, because of our uncertainty about the impact of student reassignments on the bilingual programs we believed sanctioned and required by this Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974).

[55] Pet. App. at p. 34a. Also, see LULAC Appendix at pp. 8-9.

Accordingly, we urge this Court to reject the LULAC petition challenging the Sixth Circuit's refusal to reverse the district court's denial of intervention.

CONCLUSION

For the reasons set forth above, we urge this Court to deny each and every one of the three petitions for certiorari filed from the April 14, 1980 Sixth Circuit decisions and orders. In our view, these decisions simply require the local and state defendants to adhere to this Court's original intent on remand from *Milliken I* that a plan issue for converting the Detroit dual system to a unitary system. No such plan has yet been completed, because of the persistence of the Detroit Board and district court in distorting the previous liability findings to suit their current perceptions of reality or expediency. The previous *de jure* findings explicitly involved all schools in all regions of the Detroit public school system. It is not error for the Court of Appeals to expect and demand that the district court's remedy reach as many of those racially segregated schools and benefit as many of those schools' harmed students as is feasible under the circumstances. As the Court of Appeals noted in its remand:

> "There are now 66,650 students attending schools in Regions 1, 5 and 8. The remedial measures implemented to date afford none of these students any relief from de jure segregation."[55]

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[55] Pet. App. at p. 21a. Plaintiffs point out the irony that, after two trips to the Supreme Court and numerous hearings before the Court of Appeals and the district court, the schools in which Ronald Bradley, the lead Plaintiff, suffered his educational deprivations continue to be rigidly segregated because of the resistance of the Detroit Board and the decisions of the district court.

Nor was it error for the Court of Appeals to affirm the district court denial of intervention, order an evidentiary hearing to determine the extent of prior discrimination against Hispanics as a predicate for further remedial relief if needed, or grant LULAC intervention status to litigate on behalf of Hispanic students in the contemplated remand hearing.

There will be ample time, after the proceedings directed by the Court of Appeals have been conducted, to determine whether the district court and Court of Appeals decisions comport with the teachings of this Court. At this time, the case is not in a posture which warrants the Writs sought and they, like those sought in the Dallas case, would be improvidently granted at this time.

Respectfully submitted,

THOMAS I. ATKINS
NAACP General Counsel
1790 Broadway
New York, New York 10019
(212) 245-2100

WILLIAM E. CALDWELL
Ratner, Sugarmon, Salky
and Henderson
525 Commerce Title Building
Memphis, Tennessee 38103

NORMAN J. CHACHKIN
Lawyers' Committee for Civil Rights Under Law
Suite 520
Woodward Building
733 15th Street, N.W.
Washington, D.C. 20005

DAUNE ELSTON
1311 E. Jefferson Blvd.
Detroit, Michigan